

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

IN RE:
Annice Marjorie Hartman,
Debtor.

Bky. No. 04-34554 GFK

OBJECTION TO CONFIRMATION

1. TopLine Federal Credit Union (TopLine), a creditor of Debtor herein, makes this objection to the confirmation of the Debtor's proposed Chapter 13 Plan.

2. This objection is filed pursuant to Bankruptcy Rule 3020(b), Local Rules 604 and 1202, and Creditor requests this Court to enter an order denying confirmation of Debtor's proposed Chapter 13 Plan (the "Plan").

3. The Debtor voluntarily filed a petition commencing this case and the case is now pending in this Court. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 1334(a) and 157(a), 11 U.S.C. § 1325 and applicable rules. This matter is a core proceeding.

4. Hearing on Confirmation of the Plan is scheduled for September 23, 2004, at 10:30 a.m., before the Honorable Gregory F. Kishel at United States Courthouse, Room 228-B, 316 North Robert Street, St. Paul, Minnesota, or as soon thereafter as counsel may be heard.

5. Any objection to the relief requested herein must be served and filed not later than 10:30 o'clock a.m., on September 22, 2004, which is 24 hours before the time set for the hearing.

**UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT
MAY GRANT THE MOTION WITHOUT A HEARING.**

6. TopLine is an unsecured creditor of the Debtor.

7. The chapter 13 plan proposed by the Debtor has not been proposed in good faith as required by 11 U.S.C. § 1325(a)(3). The totality of the circumstances show the Debtor is concerned only with making the minimum payments on debts which would be non-dischargeable in a chapter 7 bankruptcy.

8. The Debtor will not be able to make all payments under the proposed chapter 13 plan. The Debtor, by her past behavior, has demonstrated an on-going gambling problem which will interfere with her ability to comply with the plan.

9. If testimony is necessary as to any facts relevant to this motion, Kirstin Bethke or Denise Karngbaye of Movant, 9353 Jefferson Highway, Maple Grove, MN, 55369, will testify on behalf of Movant.

WHEREFORE, Creditor respectfully requests this Court to enter an order denying confirmation of the Debtor's proposed plan and such other further relief as is just and equitable.

Date: September 15, 2004.

FOLEY & MANSFIELD, P.L.L.P.

By /s/ Ruth E. Honkanen

Thomas J. Lallier (#163041)

Ruth E. Honkanen (#175924)

Attorneys for Creditor

250 Marquette Avenue, Suite 1200

Minneapolis, MN 55401

(612) 338-8788

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:
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MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION

This Memorandum of Law is submitted in support of the Objection to Confirmation filed by TopLine Federal Credit Union (TopLine).

The Debtor filed a chapter 13 plan. The plan is for 36 months and requires the Debtor to pay \$332.00 a month. The Debtor has no secured or priority debts. The Debtor listed unsecured debts of \$83,397.00. The Debtor's proposed plan would pay \$9,813.00 to unsecured creditors for a dividend of approximately 11%. TopLine believes this does not constitute the best effort of the Debtor, especially since the debt to TopLine, and perhaps other creditors, would be non-dischargeable in a chapter 7 case.

According to the schedules, the unsecured debts are all for credit card charges. What the Debtor did not disclose is the majority of the debts were incurred for gambling related expenses. At the meeting of creditors, the Debtor, when questioned regarding the reason for her filing, initially testified the debts were the result of a heart attack suffered by her husband two years earlier. When confronted about charges incurred at casinos and casino hotels, the Debtor finally admitted she had gambled, but claimed she no longer would; that she and her husband had learned their lesson. The Debtor then claimed she did not know where the other charges on other credit cards were incurred.

The Debtor has listed a minimum amount of personal property. No automobile is listed, but automobile expenses are listed. At the meeting of creditors, the Debtor admitted she and her husband did own an automobile and claimed she did not know who was on the title. The Debtor listed clothing worth \$250.00, but on her expenses listed clothing expenses of \$125.00 a month. The Debtor listed an IRA worth \$20,508.00 and two pensions of unknown value. The Debtor did not list the monthly amount received under each pension.

On the Schedule I, the Debtor listed a deduction for payroll taxes and social security of \$164.00 total for her and her husband. The Debtor and her husband are retired and there is no wages or salary from which the Debtor and her husband can have taxes deducted. The Debtor's household income should be increased by \$164.00. This would increase the monthly payment to approximately \$500.00 a month. This would increase the amount available to creditors over 60 months to \$30,000 and the amount available to distribute to unsecured creditors from \$9,813.00 to \$26,056 or from an 11% distribution to 31%.

On Schedule J the Debtor listed monthly expenses totalling \$1,893.00. As noted above, the Debtor claimed a need for \$125.00 a month for clothing. The Debtor also listed transportation expenses of \$185.00 and auto insurance of \$44.00 although no automobile is listed. The Debtor and her husband are retired. Transportation expenses of \$185.00 are excessive, even if the Debtor or her husband have a vehicle. The Debtor listed home maintenance expenses of \$20.00 a month. The Debtor lives in an apartment and has no home maintenance expense for which she is liable. Finally the Debtor listed a monthly expense of \$135.00 for "Glasses and personal care expenses." This amount is unnecessary and excessive.

The total of the challenged expenses is \$465.00 (125+185+20+135=465). Even if only half the expense is unjustified, the Debtor could increase the payments under the plan by \$233.00 a month. Over 36 months, the Debtor would pay an additional \$8,388.00. Over 60 months this would result in an additional \$13,980. With the increase in income discussed above, this would result in a distribution to unsecured creditors of \$40,036. This is almost an 50% repayment to unsecured creditors.

LACK OF GOOD FAITH

The Debtor must demonstrate good faith in the bankruptcy case. Good faith on the part of the Debtor is presumed if there is no objection to confirmation, but where a party in interest challenges the good faith of the Debtor, the Debtor bears the burden of showing good faith in all aspects of the bankruptcy. The Debtor can not make this showing in this case.

The relevant inquiry regarding good faith is “whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code. Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987). The inquiry into good faith is governed by a totality of the circumstances test. Noreen v. Slaffengren, 974 F.2d at 76; In re LeMaire, 898 F.2d at 1349; In re Estus, 695 F.2d 311, 316 (8th Cir. 1982). Factors which are particularly relevant to determining good faith under the totality of the circumstances include: (1) the nature of the debt sought to be discharged; (2) whether the debt would be dischargeable in a chapter 7 bankruptcy case; and (3) the debtor’s motivation and sincerity in seeking chapter 13 relief. In re LeMaire, 898 F.2d at 1349 (citing Estus, 695 F.2d at 317). See also In re Kurtz, 238 B.R. 826, 830 (Bankr. D.N.D. 1999) (Further consideration must be given to the sincerity of the Debtor in

putting forth his Chapter 13 plan of repayment and whether that plan demonstrates real sincerity on the part of [the Debtor] to repay his creditors as best he can in exchange for the liberal Chapter 13 discharge.”). Another relevant factor in determining good faith is the Debtor’s pre-filing conduct. In re LeMaire, 898 F.2d at 1352.

The totality of the circumstances in this case requires denial of confirmation. The Debtor did not give complete and honest answers to the questions on the schedules or to the questions at the meeting of creditors. The Debtor inflated her expenses, decreased her income, and did not disclose all her assets. The debts are all credit card debts recently incurred by the Debtor because of her gambling. Most of the debt owed to TopLine was incurred by the Debtor in the last six months for gambling. The debt to TopLine would be non-dischargeable. The debts owed to other creditors were similarly incurred and a good portion of those debts would be non-dischargeable as well. The Debtor misrepresented the nature of her debts and continues to deny she has a problem with gambling. The Debtor proposed the minimum term and repayment amount she could. The Debtor was not interested in making her best effort to repay her debts, but in making the minimum payments she could to discharge her debts in light of the nature of those debts.

This court has previously considered cases like the Debtor’s. The court has expressed its opinion for examining the good faith of the Debtor. Though the words “good faith” suggest a subjective state of mind, the courts can consider objectively-manifested circumstances to make an inference on the existence or non-existence of this element. The relevant factors include the debtor’s candor and honesty with the court in the bankruptcy case; the conformity of the plan with the policy goals of the bankruptcy laws; the debtor’s expressed attitude, past and present, toward the legal process and its values; the extent to which the debtor’s past

conduct conformed with the substantive law that governed her relationship(s) with creditor(s); and the debtor's past conduct in relation to the integrity of the legal system. The court may consider the fundamental fairness of the debtor's proposed treatments of creditors' claims.

In this case, the Debtor has not disclosed all her and her husband's assets. She has deflated her income by \$164.00 a month and included unnecessary expenses. She has not included any tax refunds in her income or pledged those refunds to repaying her creditors. She has chosen to make the minimum amount of payments. The debts the Debtor is seeking to discharge may be non-dischargeable if they are similar to the debts owed to TopLine. The Debtor has not demonstrated good faith in this case and the confirmation should be denied.

LACK OF FEASIBILITY

The Debtor must demonstrate the proposed plan is feasible. 11 U.S.C. §1325(a)(6). In most cases this is a mathematical process where the income and expenses are examined to determine whether the plan as proposed can be financed by the disposable income available to the debtor. The Debtor in this case raises another issue. The Debtor has gambled with the proceeds of the loans obtained from TopLine and possibly other creditors. When asked about the purpose for which the debts to TopLine were incurred, the Debtor originally stated it was for purchases related to her husband's prior illness. When confronted with the statements showing cash withdrawals at casinos or casino hotels, the Debtor admitted to having gambled with the money. When asked if the other debts were incurred for gambling, the Debtor testified she could not remember.

The Debtor appears to have a problem controlling her gambling activities. The bankruptcy was filed because of debts incurred by gambling. The Debtor stated at the meeting of creditors that she had learned her lesson, but has not offered any evidence of that. If the Debtor continues to

gamble, she will not be able to make the payments under any chapter 13 plan. The Debtor needs to present evidence showing she will be able to make the payments and will not be gambling in the future.

CONCLUSION

Based on the totality of the circumstances, especially in light of the gambling behavior already demonstrated by the Debtor, the Court should deny confirmation of the chapter 13 plan as proposed.

Date: September 15, 2004.

FOLEY & MANSFIELD, P.L.L.P.

By /s/ Ruth E. Honkanen

Thomas J. Lallier (#163041)

Ruth E. Honkanen (#175924)

Attorneys for Creditor

250 Marquette Avenue, Suite 1200

Minneapolis, MN 55401

(612) 338-8788

09/13/2004 MON 16:10 FAX 6123499859 foley & mansfield

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UNITED STATES BANKRUPTCY COURT
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Amice Marjorie Hartman,
Debtor,

Bky. No. 04-34554 GFK

VERIFICATION

I, Kirstin Belhke for TopLine Federal Credit Union, f/k/a Firstel Federal Credit Union, declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on: 9-14-04Signed: Kirstin Belhke
Kirstin Belhke

Unsworn Affidavit of Service

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

I, Jacquelyn J. LaVaque, declare under penalty of perjury that on September 15, 2004 , I mailed copies of the attached **Objection to Confirmation of Chapter 13 Plan** by first class mail, postage prepaid, to each entity named below at the address stated below for each entity:

Annice M. Hartman
300 Sunset Drive, Unit 2
Jordan, MN 55352

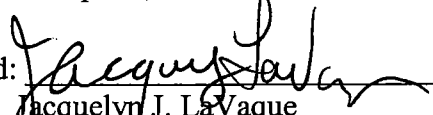
Joseph L. Kelly, Esq.
Kelly Law Office
12400 Portland Avenue S., Ste. 120
Burnsville, MN 55337

Jasmine Z. Keller
Chapter 13 Trustee
12 South Sixth St. #310
Minneapolis, MN 55402

U.S. Trustee
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Executed on: September 15, 2004

Signed:


Jacquelyn J. LaVaque
Foley & Mansfield, P.L.L.P.
250 Marquette Avenue
Suite 1200
Minneapolis, MN 55401

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ORDER DENYING CONFIRMATION

This matter came before this Court for confirmation of the Debtor's Chapter 13 Plan of Reorganization. Appearances were noted in the record. Based upon all the files and records, the Court makes this Order pursuant to the Federal Rules of Bankruptcy Procedure.

IT IS HEREBY ORDERED, That confirmation of the Debtors' Chapter 13 Plan is denied.

Dated: _____

Gregory F. Kishel
United States Bankruptcy Judge